2004

State of Utah v. Ernesto Alverez : Brief of Appellant

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

STATE OF UTAH,	:	
Plaintiff/Appellant,	:	
v.	:	
ERNESTO ALVEREZ	:	Case No. 20040059-CA
Defendant/Appellant	:	

BRIEF OF APPELLANT

Appeal from a judgment of conviction for Possession with Intent to Distribute a Controlled/Counterfeit Substance, a second degree felony, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002). Appellant has been released to INS.

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JURISDICTIONAL STATEMENT

Appellant/Defendant Ernesto Alverez ("Mr. Alverez" or "Appellant") appeals from the denial of his Motion to Suppress Illegally Obtained Evidence, entered by the Honorable Paul G. Maughn, Third District Court, Salt Lake County, Utah. A copy of the Findings of Fact, Conclusions of Law, and Order denying Appellant's Motion to Dismiss is in Addendum A. This Court has jurisdiction over this appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (2002).

STATEMENT OF THE ISSUE, STANDARD OF REVIEW, PRESERVATION

Mr. Alverez filed a Motion to Suppress the illegally obtained evidence acquired when officers exceeded the scope of their detention without reasonable articulable suspicion and then proceeded to forcibly conduct a warrantless search of Mr. Alverez without probable cause or exigent circumstances.

Issue. Whether the trial court erred in denying Mr. Alverez's motion to suppress

evidence, where the officers engaged in a level-two seizure without reasonable articulable suspicion and ultimately conducted an unlawful, warrantless search?

Standard of Review: The applicable standard is bifurcated. "The factual findings of a trial court that underlie its decision to grant or deny a motion to suppress will not be disturbed on appeal unless clearly erroneous." State v. Davis, 821 P.2d 9, 11 (Utah Ct. App. 1991); Salt Lake City v. Ray, 2000 UT App 55, ¶8, 998 P.2d 274. The trial court's legal conclusions are reviewed for correctness, where "the appellate court decides the matter for itself and does not defer in any degree to the trial judge's determination of law." State v. Pena, 869 P.2d 932, 936 (Utah 1994), abrogated in part by Campbell v. State Farm Mut. Auto Ins., Co., 2001 UT 89, ¶13, 432 Utah Adv. Rep. 44.

Preservation. This issue was preserved below. R. 32-34,35-40, 44-46, 62-69, 88.

TEXT OF RELEVANT RULES AND CONSTITUTIONAL PROVISIONS

The text of the following rules and constitutional provisions are in Addendum B:

U.S. Const. amend. IV;
Utah Code Ann. §77-7-15 (2003).

STATEMENT OF THE CASE

On June 26, 2003, Mr. Alverez was charged with two counts of Unlawful Possession of a Controlled Substance or Counterfeit Substance with the Intent to Distribute, second degree felonies, in violation of Utah Code Ann. § 58-37-8(1)(a)(iii) (2002). R. 1-2. On August 13, 2003, Mr. Alverez filed a motion to suppress the illegally obtained evidence. R. 32-34.

On August 29, 2003, the trial court held an evidentiary hearing on Mr. Alverez's motion to suppress. R. 42-43; 88. After the state presented evidence, the trial court denied the motion to suppress. R. 43-46; 88:38. On October 17, 2003, Mr. Alverez filed a petition for interlocutory review of the trial court's denial of his motion to suppress. R. 47-48; 54-59; 88:39. On November 26, 2003, this Court denied Mr. Alverez's petition for interlocutory review. R. 56.

On January 5, 2004, Mr. Alverez entered into a conditional guilty plea pursuant to State v. Sery, 758 P.2d 935 (Utah Ct. App. 1988), wherein he pled guilty to one count of unlawful possession of a controlled/counterfeit substance with the intent to distribute, a second degree felony offense. R. 62-71. Mr. Alverez and the state specifically agreed that Mr. Alverez's "[p]lea [was] conditional to allow [an] appeal of [the trial court's denial] of [the] motion to suppress." R. 67. Mr. Alverez was sentenced to an indeterminate term of 1 to 15 years in prison. R. 70. The trial court suspended the prison term upon Mr. Alverez serving 30 days in jail. R. 71. As a condition of probation, Mr. Alverez was released to Immigration and Naturalization Service for deportation. R. 71.

STATEMENT OF THE FACTS

On August 29, 2003, a motion to suppress hearing was held in the above-entitled case. R. 42-43; 88. During the hearing, the following evidence was presented.

On June 23, 2003, Officer Don Walling and another officer, with the Salt Lake City Police Department, were observing a condominium complex (complex) on 2450

Elizabeth Street because they had heard there were drug dealings in this general area.[1] R. 88:3-4, 9. The officers did not have any specific information that drug dealings were going on in this particular complex but were taking "a chance that day to see if anything was going to come in and out of there." R. 88:9. While observing the complex , the officers saw a vehicle pull up. R. 88:4. Walling and the other officer recognized this vehicle as one listed in a narcotics department report as "possibly dealing drugs." R. 88:3. Someone had called to report alleged drug sales near their residence around 2 nd South and Douglas Street and reported observing this vehicle in that area. R. 88:10. Mr. Alverez got out of the vehicle, went into the complex and in less than five minutes returned to the vehicle and left. R. 88:4. Walling believed a drug transaction occurred because this visit was consistent with short-stay drug traffic. R. 88:4, 10. Although Walling thought a drug transaction had occurred he did not observe a moving violation allowing him to make a traffic stop. R. 88:10-11. Walling could have made a stop based on his knowledge that the vehicle did not have insurance but his squad has "advised with cases such as this that we're better off [basing a stop on] an equipment . . . or moving violation." R. 88:18-19.

The next day, on June 24th, Walling and Sergeant Chad Steed, also with the Salt

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[1]The probable cause statement indicates that the complex's address is 2430 South Elizabeth Street instead of 2450 as indicated in the motion to suppress hearing. R.2 To the extent that this number represents the whole condominium complex, the address is cited as given in the motion to suppress hearing.

Lake City Police Department, were observing the complex to see whether this same vehicle would return. R. 88:3, 21. Walling and Steed, observed the vehicle pull into the same area of the complex and Mr. Alverez get out and walk somewhere into the complex. R. 88:4, 21. Walling and Steed could not see what area or which unit in the complex Mr. Alverez was going to. R. 88:13, 15, 32. Nor did Walling or Steed try to ascertain which unit Mr. Alverez was going to. R. 88:13-15, 32. Instead, Walling and Steed pulled their unmarked vehicle around to where the vehicle Mr. Alverez was driving was parked. R. 88:4, 21, 31. Walling and Steed got out of their vehicle and waited next to the vehicle Mr. Alverez was driving to see whether he would return in the same manner as previously observed. R. 88:4, 21, 31. Steed testified that they chose to confront Mr. Alverez as he tried to get into his vehicle rather than attempt to stop him for an insurance violation because "it was [their] belief [from his experience] with individuals where [they] attempt to make a traffic stop and [individuals] don't immediately come to a stop but drive down the road and swallow water and thus conceal evidence." R. 88:32-33. In addition, their "department has a non-pursuit policy which wouldn't allow [them] to chase a person had they decided not to stop once they've entered the vehicle." R. 88:33. Steed testified that he did not have any particular reason to believe that Mr. Alverez would run from them because during their contact Mr. Alverez was compliant, polite, and non-threatening. R. 88:33.

While waiting for Mr. Alverez to return, Steed noticed "a small bottle of water in

the console of the vehicle" which Steed has "seen [individuals believed to have narcotics] use . . . to swallow drugs that they contain in their mouths." R. 88:29. Steed also observed a facsimile of "Jesus Malverde" which Steed has seen before in drug houses and "[a]ccording to the people that [he had] talked to [Jesus Malverde is] the patron saint of drug dealing." R. 88:22, 29. However, during voir dire Steed was unable to distinguish Malverde from other male Catholic imagery, other than Christ. R. 88:28.

Walling and Steed stood next to the vehicle behind a full-size van waiting for Mr. Alverez to return to his vehicle. R. 88:5-6, 15, 21. As Mr. Alverez approached the vehicle, Walling and Steed "came around the van" to confront him. R. 88:5-6, 15, 21. Both Walling and Steed were wearing uniforms. R. 88:2. "Initially, when [Walling] stopped [Mr. Alverez he] asked him if he knew the vehicle that he was driving was uninsured." R. 88:6, 15-16. Mr. Alverez responded "How'd you know that?" R. 88:6, 16. Walling "then went on to explain to [Mr. Alverez] that this vehicle that he was driving had been suspected of being a vehicle involved in some drug dealing activities." R. 88:6, 16. Mr. Alverez "stated he knew nothing of that." R. 88:6. Walling then proceeded to ask Mr. Alverez "if he had any drugs on his person." R. 88:6, 16. Mr. Alverez responded "No." R. 88:6, 17. While talking with Mr. Alverez, Walling did not have difficulty understanding him nor did he notice any unsightly or unusual bulges in Mr. Alverez's mouth. R. 88:16. In fact, Walling thought Mr. Alverez "talked quite well" and did not notice Mr. Alverez doing anything he would consider unusual. R. 88:16-17,

19. Walling "then asked [Mr. Alverez] if he minded opening up his mouth to show [Walling] he didn't have any drugs in his mouth." R. 88:6, 17. Walling stated that this is a standard question he asks of people he perceives to be drug dealers. R. 88:18. Walling thought Mr. Alverez became nervous when asked this question. R. 88:18. Walling then "began to . . . observe [Mr. Alverez] attempting to move some objects . . . in his mouth and then . . . [Walling] could see some swallowing motion going on." R. 88:7, 30. Although Mr. Alverez's "mouth was closed," Walling "could see things . . .in the pit of Mr. Alverez's lip area" that looked "like his tongue and moving other objects in attempting to swallow at that time." R. 88:7, 19. Steed only noticed that Mr. Alverez "just appeared that he was attempting to swallow." R. 88:30. Walling and Steed immediately grabbed one of Mr. Alverez's arms and put him in a wrist lock, bending him forward telling him "to spit out what he had in his mouth." R. 88:7-8, 30-31. Mr. Alverez then spit out 15 balloons containing drugs. R. 88:7, 31. The time that passed between Walling asking to search Mr. Alverez's mouth until Mr. Alverez was forced to spit out the balloons was between five to 10 seconds. R. 88:8, 17.

At the conclusion of the evidentiary hearing, the trial court denied the motion to suppress stating that under the totality of the circumstances the officers had a "reasonable basis to believe a crime was being committed in their presence" "if for no other reason" than "at the time that Mr. Alverez was asked if he would open his mouth, he doesn't open his mouth and starts to, in the officer's eyes, destroy evidence." R. 43; 88:38. On

October 17, 2003, Mr. Alverez filed a petition for interlocutory review of the trial court's denial of his motion to suppress. On November 26, 2003, this Court denied Mr. Alverez's petition for interlocutory review. R. 56. Mr. Alverez entered into a plea pursuant to Sery conditionally pleading guilty to one count of unlawful possession of a controlled/counterfeit substance with the intent to distribute allowing an appeal of the trial court's denial of his motion to suppress. R. 62-71.

SUMMARY OF THE ARGUMENT

The trial court erred in denying Mr. Alverez's motion to suppress illegally obtained evidence when officers exceeded the scope of their initial level-two detention of Mr. Alverez without reasonable articulable suspicion in violation of the Fourth Amendment. A level-two encounter exists when in view of the totality of the circumstances a person would believe he is not free to leave. The officers conducted a level-two detention of Mr. Alverez based on their suspicion that the vehicle he was driving lacked insurance. However, the officers exceeded the scope of their initial detention when they began questioning Mr. Alverez regarding drugs without a reasonable suspicion of more serious criminal activity. The state failed to establish that the factors relied on by the officers supported a reasonable suspicion that Mr. Alverez was engaged in drug activity. Those factors consisted of a bottle of water, a facsimile of Jesus Malverde, two short stay visits, and a narcotic intelligence report identifying the vehicle driven by Mr. Alverez as possibly being involved in drug activity. The trial court

gave little weight to the bottle of water and facsimile and the state failed to establish its burden of proof regarding the veracity of the report or the significance of the two short stay visits. The totality of these factors failed to establish a reasonable suspicion that Mr. Alverez was involved in drug activity permitting the officers to exceed the scope of their initial detention. Therefore, the officers' additional questions regarding drugs violated the Fourth Amendment.

Even if this Court were to determine that the officers had a reasonable suspicion of drug activity allowing them to exceed the scope of their initial detention, the state failed to meet its burden justifying the officers' warrantless search of Mr. Alverez. The state failed to establish by probable cause that there was a "clear indication" that drugs would be found in Mr. Alverez's mouth. The state also failed to show that exigent circumstances justified their warrantless search since it presented no evidence that if the balloons of drugs were swallowed they would not be susceptible to identification or recovery. Finally, the state failed to present any evidence that the method of searching Mr. Alverez was reasonable given the circumstances. Therefore, all the evidence seized as a result of the warrantless search should be suppressed.

ARGUMENT

POINT I. THE TRIAL COURT ERRED IN DENYING MR. ALVEREZ'S MOTION TO SUPPRESS ILLEGALLY OBTAINED EVIDENCE WHERE OFFICERS CONDUCTED A LEVEL-TWO DETENTION THEN EXCEEDED THE SCOPE OF THAT DETENTION WITHOUT REASONABLE ARTICULABLE SUSPICION.

The Fourth Amendment to the United States Constitution provides the following:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. In Terry v. Ohio, 392 U.S. 1 (1968), the United States Supreme Court set forth an exception to the "probable cause" standard. "Under Terry [], and its progeny, there are three levels of police-citizen encounters, each requiring a different degree of justification under the Fourth Amendment." Salt Lake City v. Smoot, 921 P.2d 1003, 1006 (Utah Ct. App. 1996); State v. Deitman, 739 P.2d 616, 617-18 (1987). "A level one citizen encounter with a law enforcement official is a consensual encounter wherein a citizen voluntarily responds to non-coercive questioning by an officer." State v. Hansen 2002 UT 125,¶34-36, 63 P.3d 650 (citations omitted). There is no seizure implicating the Fourth Amendment in a level-one encounter because "the person is free to leave at any point." Id. Under a level-two encounter "an officer may seize a person if the officer has an 'articulable suspicion' that the person has committed or is about to commit a crime; however, the "detention must be temporary and last no longer than is necessary to effectuate the purpose of the stop."' Deitman, 739 P.2d 616, 617 (Utah 1987) (internal quotations and citations omitted); State v. Steward, 806 P.2d 213, 215 (Utah Ct. App. 1991) (quoting State v. Swanigan, 699 P.2d 718, 719 (Utah 1985)); see also United States v. Place, 462 U.S. 696, 706 (1983); State v. Kohl, 2000 UT 35, ¶11,

999 P.2d 7 ("a stop is justified only if there is a reasonable suspicion that a person is involved in criminal activity."); Utah Code Ann. § 77-7-15 (2003) (officer must have reasonable suspicion to stop person in a public place and request name, address and explanation of actions). Under a level-three detention, "an officer may arrest a suspect if the officer has probable cause to believe an offense has been committed or is being committed." Id. The Fourth Amendment is implicated under both a level-two and level-three detention. The state bears the burden of proving that an officer had reasonable suspicion to justify a level-two encounter. See State v. Delaney, 869 P.2d 4, 7 (Utah Ct. App. 1994).

Once a level-two detention is made, "[t]he length and scope of the detention must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." State v. Johnson, 805 P.2d 761, 763 (Utah 1991) (quotations and citations omitted). In order to justify exceeding the scope of the initial detention the officers "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion." Id. at 764 (quotations and citations omitted).

> There is no bright line test for what is, or is not, reasonable suspicion. Id. Whether the officer had reasonable suspicion depends on the "totality of the circumstances." Id. (citations omitted). The "totality of the circumstances" analysis must be based upon all the circumstances and must "raise a suspicion that the particular individual being stopped is engaged in wrongdoing." United States v. Cortez, 449 U.S. 411, 418, 101 S.Ct. 690, 695, 66 L.Ed.2d 621 (1981) (emphasis added).

> Put differently, the officers must have a "particularized and objective basis for suspecting criminal activity by the particular person detained." State v. Sery, 758 P.2d 935, 941 (Utah Ct. App. 1988) (citing Cortez, 449 U.S. at 417-18, 101 S.Ct. at 694-95).

Steward, 806 P.2d at 215-16; State v. Trujillo, 739 P.2d 85, 88 (Utah Ct. App. 1987).

The "reasonable articulable suspicion" test requires the police officer "to point to 'specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant [the additional] intrusion.'" Sery, 758 P.2d at 940 (quoting Terry, 392 U.S. at 21); State v. Lopez, 873 P.2d 1127, 1132 (Utah 1994) (reasonable suspicion must be based on specific, articulable facts from the total circumstances facing the officer at the time of the stop). "Anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ." Sery, 758 P.2d at 941 (quoting Terry, 392 U.S. at 21-22). The officer's subjective belief regarding the matter is irrelevant. Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant). "[T]he State bears the initial burden for establishing the articulable factual basis for the reasonable suspicion necessary to support an investigative stop." State v. Case, 884 P.2d 1274, 1276 (Utah Ct. App. 1994). If the officers expanded detention is not justified by an articulable suspicion that the individual has committed a crime, the Fourth Amendment is violated by the additional intrusion. Id.

Here, officers conducted a level-two detention of Mr. Alverez when questioning him regarding the lack of insurance on the vehicle he was driving. The officers then

exceeded the scope of that initial detention by questioning Mr. Alverez regarding drugs without the requisite reasonable articulable suspicion necessary in violation of the Fourth Amendment. Therefore, the trial court's erred in denying Mr. Alverez's Motion to Suppress the evidence obtained as a result of the officers illegal level-two detention.

A. A Level-Two Seizure Occurs When Under The Totality of the Circumstances A Reasonable Person Would Believe He Is Not Free to Leave.

The state argued that the officers' initial questioning of Mr. Alverez regarding the vehicle's lack of insurance was a level-one encounter. R. 37. Contrary to the state's contention, officers conducted a level-two detention of Mr. Alverez. "The distinction between a level-one encounter (a purely consensual encounter) and a level-two encounter (a seizure requiring reasonable suspicion) depends on whether, through a show of physical force or authority, a person believes his freedom of movement is restrained." State v. Struhs, 940 P.2d 1225, 1227 (Utah Ct. App. 1997) (citing United States v. Mendenhall, 446 U.S. 544 (1980)); State v. Trujillo, 739 P.2d 85, 87 (Utah Ct. App. 1987). A level-two "seizure under the fourth amendment occurs when a reasonable person, in view of all the circumstances, would believe he or she is not free to leave. This is true 'even if the purpose of the stop is limited and the resulting detention brief.'" Ray, 2000 UT App 55 at ¶11 (quotations and citations omitted).

"Important to the determination [of whether the officers were engaged in a level-two encounter] is whether [Mr. Alverez] remained, not in the spirit of cooperation with

the officer's investigation, but because he believed he [was] not free to leave." Struhs, 940 P.2d at 1227 (quotations omitted). Factors tending to indicate a level-two seizure include: (1) the failure to inform the individual "he is free to leave, or that he does not have to answer additional questions," (2) "failure to issue a warning or citation before engaging in additional questioning," (3) "a coercive show of authority, such as the presence of more than one officer, the display of a weapon, physical touching by the officer, or his use of a commanding tone of voice indicating that compliance might be compelled," [Hansen, 2002 UT 125 at ¶41; State v. Patefield, 927 P.2d 655, 659 (Utah Ct. App. 1996)]; (4) "an officer block[ing] a defendant's vehicle," (5) an "officer's stealthy approach" [Struhs, 940 P.2d at 1227-28]; and (6) accusatory or investigatory questions that indicate the individual is suspected of being "engaged in some sort of illegal activity." State v. Hansen, 2000 UT App 353, ¶14, 17 P.3d 1135 reversed in part on other grounds Hansen, 2002 UT 125.

Many of these factors were present during Mr. Alverez's encounter with Walling and Steed. For example, the officers used a "stealthy approach" in confronting Mr. Alverez. While waiting for Mr. Alverez to return to the vehicle, Walling and Steed stood behind a full-sized van parked next to the vehicle. R. 88:5-6. Walling and Steed then stepped out of their hiding place and "came around the van" intercepting Mr. Alverez's path as he attempted to approach the vehicle. R. 88:5-6, 15, 21. Standing next to the vehicle, Mr. Alverez was then subjected to a coercive show of authority as Walling and

Steed both confronted him wearing their full uniforms. R. 88:2. Walling and Steed then subjected Mr. Alverez to accusatory questions that indicated he was suspected of being engaged in illegal activity. R. 88:6, 15-16. Walling initially asked whether Mr. Alverez "knew the vehicle that he was driving was uninsured." R. 88:6, 15. Walling and Steed never indicated that Mr. Alverez was going to be cited for not having insurance, never asked Mr. Alverez his name or for his identification or even if the vehicle belonged to him. See Hansen, 2000 UT App 353 at ¶15 ("[T]he fact that [the officer] had not addressed one of the reasons for the initial stop, a reasonable person would not have felt free to terminate the encounter."). Rather, after Mr. Alverez inquired how Walling knew that the vehicle was uninsured, Walling immediately told Mr. Alverez that the "vehicle that he was driving had been suspected of being a vehicle involved in some drug dealing activities." R. 88:6, 16. Walling then proceeded to ask Mr. Alverez "if he had any drugs on his person." R. 88:6, 16. When Mr. Alverez responded "No," Walling asked if he could search his mouth. R. 88:6, 16-17.

These were not simply questions posed to Mr. Alverez which he was free to disregard and walk away. See State v. Jackson, 805 P.2d 765, 767 (Utah Ct. App. 1990). Indeed, given the totality of circumstances, the officers' "conduct would have communicated to a reasonable person that the person was not free to decline the officers[']requests or otherwise terminate the encounter and go about his . . . business." Hansen, 2000 UT App at ¶12 (quotations and citations omitted). Therefore, Mr. Alverez

was seized for purposes implicating the Fourth Amendment the moment the officers detained him with questions regarding the vehicle's insurance.

B. Additional Questions Further Detaining Mr. Alverez Must Have Been Supported By Reasonable Suspicion of More Serious Criminal Activity.

The state argued in its opposition to Mr. Alverez's motion to suppress that "[t]he additional detainment of [Mr. Alverez] was supported by reasonable suspicion that [Mr. Alverez] was participating in drug activity based on the narcotic intelligence report, the items observed in the car, and [Mr. Alverez]'s attempt to swallow while being questioned." R. 37-38. However, an officer may expand the length and/or scope of the level-two detention only if the officer obtains additional information, "independent" of the original justification for the stop, to support further detention. See Chapman, 921 P.2d at 453. Here, the state relies on information to justify the further detention that the officers knew before detaining Mr. Alverez and realized was not enough to create a reasonable suspicion of drug activity allowing them to initiate a level-two detention. Furthermore, the officers did not observe any conduct by Mr. Alverez that would suggest that he was engaging in any type of drug activity. Therefore, questions pertaining to drug activity exceed the scope of the stop in violation of the Fourth Amendment.

In determining whether a "seizure is constitutionally reasonable, [this Court] must first determine whether the officers['] action[s were] justified at [their] inception." State v. Chapman, 921 P.2d 446, 450 (Utah 1996) (quotations and citations omitted). "If so, [this Court] then consider[s] whether the resulting detention was reasonably related in

scope to the circumstances that justified the interference in the first place." Id. (quotations and citations omitted). Mr. Alverez does not dispute that reasonable suspicion existed allowing Walling and Steed to engage him in a level-two stop regarding the vehicle's lack of insurance. However, "once a stop is made, the detention 'must be temporary and last no longer than is necessary to effectuate the purpose of the stop.'" Id. at 452 (quotations and citations omitted).

Questions that would be "reasonably related" to the scope of the detention would be limited to those types of questions that would assist the officers in ascertaining information regarding the vehicle's insurance status. Instead, Walling's questioning regarding the vehicle's insurance was limited to one accusatory statement. Walling never asked Mr. Alverez for an explanation regarding the vehicle's lack of insurance, or identification, or whether he in fact owned the vehicle. Nor did Walling indicate how the vehicle's lack of insurance was going to be handled. Rather, Walling immediately told Mr. Alverez that the "vehicle he was driving had been suspected of being a vehicle involved in some drug dealing activities." R. 88:6, 16. Walling then proceeded to ask Mr. Alverez "if he had any drugs on his person" and "if he minded opening up his mouth to show [Walling] he didn't have any drugs in his mouth." R. 88:6, 16-17.

Questions pertaining to Mr. Alverez's suspected involvement in drug activity exceeded the scope justifying the initial stop. "Investigative questioning that further detains [an individual] must be supported by reasonable suspicion of more serious

criminal activity." Lopez, 873 P.2d at 1132. The officers "must be able to articulate a particularized and objective basis for their suspicions that is drawn from the totality of circumstances facing them at the time of the seizure." State v. Robinson, 797 P.2d 431,436 (Utah Ct. App. 1990). More specifically, the officers must have a "particularized and objective basis for suspecting criminal activity by the particular person detained." Sery, 758 P.2d at 941 (emphasis added) (citing Cortez, 449 U.S. at 417-18, 101 S.Ct. at 694-95).

Nothing in Mr. Alverez's conduct or response regarding the vehicle's insurance gave rise to a reasonable suspicion of more serious criminal activity. The information the officers possessed was insufficient to establish a reasonable suspicion that Mr. Alverez was or had engaged in criminal activity. This information consisted of the following: the vehicle Mr. Alverez was driving was listed on a "narcotics intelligence report" as "possibly" dealing drugs, two short stay visits to the complex, a bottle of water and facsimile of Jesus Malverde observed inside the vehicle. "None of these factors, either singly or in the aggregate, necessarily indicate wrongdoing as opposed to innocent actions by [Mr. Alverez]." State v. Sykes, 840 P.2d 825, 828 (Utah Ct. App. 1992). In fact, these factors did not create a "particularized and objective basis for suspecting" that Mr. Alverez was engaged in criminal activity. Steward, 806 P.2d at 216 (quotations and citations omitted).

The trial court's examination of the totality of these circumstances further

illustrates how these factors did not indicate that Mr. Alverez was engaged in criminal activity. The trial court stated "[t]here are no premises that are identified in this matter, there are no - the vehicle was under suspicion, but I don't know how that was other than the two short term stays that the officer testified there are some other involvement that we don't know about. I give little weight - weight but very little weight to the water bottle and to the [Jesus Malverde] image in the car . . ." R. 88:38. The trial court then went on to erroneously conclude that the officers had a reasonable suspicion to believe a "crime was being committed in their presence" "if for no other reason" than when "Mr. Alverez was asked if he would open his mouth, he doesn't open his mouth and starts to, in the officer's eyes, destroy evidence." R. 88:38. See Point II. The trial court's reasoning underscores the state's failure in establishing its initial burden that these factors supported a reasonable suspicion that Mr. Alverez was engaged in drug activity.

The trial court correctly gave "very little" credence to the bottle of water and Jesus Malverde facsimile in making its determination. The only other two factors the officers had to rely on to support a reasonable suspicion were the narcotics intelligence report and the two short stay visits. However, it is apparent from the record that the trial court also did not give these two factors much weight either stating, "the vehicle was under suspicion, but I don't know how that was other than the two short term stays that the officer testified there are some other involvement that we don't know about." R. 88:38. Moreover, these factors hold little, if any, weight because the state failed to establish its

burden of proof regarding the veracity of this narcotics intelligence report or the significance of Mr. Alverez's two short stay visits to the complex. Therefore, taken together these insignificant factors failed to give rise to a reasonable suspicion that Mr. Alverez was engaged in criminal activity allowing the officers to exceed the scope of their initial detention.

1. The State Failed to Establish Its Burden Of Proof Regarding the Veracity of The Narcotics Intelligence Report.

The state failed in its burden to present any evidence regarding the reliability of the "narcotics intelligence report" used to identify the vehicle Mr. Alverez was driving as being involved in drug activity. The only evidence offered about this report was that Walling was observing the condominium complex on 2450 Elizabeth Street "looking to see [if] a vehicle was going to return that [he] had [seen] on the previous day. This vehicle [was] one that [he] had received information from [his] narcotics department that was possibly dealing drugs." R. 88:3. The department "had somebody who called in and reported drug sales near her place" which was "2nd South and Douglas Street where the vehicle was observed." R. 88:9-10. While an investigating officer receiving an informant report "may take it at face value and act on it forthwith," [Kaysville City v. Mulcahy, 943 P.2d 231, 234 (Utah Ct. App. 1997)] if the investigating officer's conduct is later challenged in a motion to suppress, the state will be required to show – after the fact – that the informant's report had sufficient information to support the conduct and the investigating officer sufficiently corroborated the report to sustain a finding of

reasonable suspicion. See Case, 884 P.2d at 1277.

This Court has explained the doctrine concerning reliance on an informant's tip in Mulcahy. Mulcahy, 943 P.2d at 233; see also State v. Valenzuela, 2001 UT App 332, ¶15, 37 P.3d 260. This Court identified three factors to consider in assessing whether information, including an informant's report, is sufficiently reliable. Id. at 235-36.

> [This Court's] first focus is upon "the type of tip or informant involved," granting identified informants substantially more credibility than anonymous informants. Next, [the Court] examine[s] "whether the informants gave enough detail about the observed criminal activity to support a [seizure]," and concluded that "[a] tip is more reliable if it is apparent that the informant observed the details personally, instead of relaying information from a third party." Finally, [this Court] examine[s] "whether the police officer's personal observation confirm the dispatcher's report of the informant's tip," noting that an officer can corroborate the information "'either by observing the illegal activity[,] or by finding the person, [and the other material facts] substantially as described by the informant.'" Moreover, while we stated that "'where the reliability of the information is increased, less corroboration is necessary,'" we also established that absent a risk to public safety we expect police officers to make significant independent corroborative efforts to confirm the information.

Valenzuela, 2001 UT App 332 at ¶15 (emphasis added) (citations omitted).

In Mulcahy, the tip of a "drunk driver who was at the time on the road," came from an "identified citizen-informer." Mulcahy, 943 P.2d at 236-37. The informant gave his name and address, thereby making himself available to verify the report's details and exposing himself to prosecution if the report turned out to be false. This Court considered the informant in that case to be "high on the reliability scale." Id. "[W]e simply presume his report to the dispatcher was reliable and truthful," thereby supporting

reasonable-articulable-suspicion in that case to justify the officer's traffic stop. Id.

In Alverez's case, the state failed to offer any evidence regarding this report, therefore, the type of information this report was based on is unknown. While the record indicates that "somebody" called in to report drug dealing in their neighborhood, there is no way to know whether the person reporting this tip is a "named citizen informant" where the veracity of the information is assumed to be more reliable or an anonymous caller where the basis of the tipsters "knowledge and veracity are typically unknown." Mulcahy, 943 P.2d 235 (citation omitted); see also City of St. George v. Carter, 945 P.2d 165, 169 (Utah Ct. App. 1997) ("A tip from a citizen informant who gives his or her name is highly reliable because the police may verify the information and it subjects the informant to penalty if the information is false."). At most, the record supports that this report was based on an anonymous citizen tip concerning drug dealings in this person's neighborhood twenty blocks away on 2nd South and Douglas Street. See R. 88:9-10 (Mr. Alverez was seized at a complex located on 2450 Elizabeth Street). Anonymous tips such as this "are toward 'the low-end of the reliability scale.'" Id. (citation omitted); see also Florida v. J.L., 529 U.S. 266, 120 S.Ct. 1375, 1378 (2000) ("anonymous tips . . . are generally less reliable than tips from known informants."). Since the record in this case is silent with respect to the type of information the report relied on and the type of person who called with the report, under the first factor, the information provided to the officers was on the low end of the reliability scale, weighing against a determination that

reasonable suspicion existed to exceed the scope of the initial detention.

Next, the state failed to present any evidence regarding the details of the informant's observations of "criminal activity to support a [seizure]." The only information regarding the informant's observations is that "somebody . . . called in and reported drug sales near her place" which was "2nd South and Douglas Street where the vehicle was observed." R. 88:9-10. Due to the state's failure to present any evidence regarding the information this report relied on, there is no indication as to whether the informant made any personal observations or had first-hand information concerning the alleged drug sales. In sum, there is no indication as to whether the informant based her report on a mere hunch, a casual rumor or an unconfirmed report from an unidentified third party. While Walling and Steed may have been entitled to take the information at face value, Mulcahy, 943 P.2d at 234, the state failed to establish "after the fact" the details of the information that spurred the dispatch. In this case, the information linking the vehicle to alleged drug sales provided no specific indicia of reliability. See J.L., 120 S.Ct. at 1378. Under the second factor, the state failed to present any evidence regarding the details of the information this report relied upon to support a reasonable suspicion to exceed the scope of the initial detention.

Finally, the state failed to present evidence that the officers made "significant independent corroborative efforts to confirm the information." The record indicates that the officers were "watching this area because [they] had heard there [were drug] dealings

in this area." R. 88:3. The officers did not have any specific information that drugs were being sold from anywhere in this particular complex, rather they had just been told about drug activity in "the Elizabeth Street area of that south." R. 88:9. In fact, the officers focused on this particular complex because they were "just [taking] a chance that day to see if anything was going to come in and out of there." R. 88:9. While watching the complex on July 23rd, Walling recognized the vehicle driven by Mr. Alverez as one listed on the narcotics report. R. 88:3-4. Walling observed Mr. Alverez enter the complex and return to the vehicle in less than five minutes. R. 88:4. The following day, Walling and Steed observed the vehicle again return to the complex. R. 88:4.

Although, Walling testified he believed that a drug transaction had occurred at some unit in the complex, no attempt was made to verify his hunch. R. 88:13. In fact, both Walling and Steed testified that they could not see where in the complex Mr. Alverez walked into or which of the many units he had gone to nor did they make any attempt to find out. R. 88:13-15, 31-32. Rather than investigate, the officers "chose to deal with [Mr. Alverez]" directly. R. 88:14. In directly dealing with Mr. Alverez, the officers did not notice anything unusual about his behavior or speech that raised their suspicion that he was engaged in criminal activity. Walling testified that he did not have any difficulty understanding Mr. Alverez or notice any unusual bulges in his mouth. R. 88:16-17. In fact, Walling thought Mr. Alverez "talked quite well." R. 88:19.

In addition to the two short stay visits, the only other corroboration the officers

did of the report was to look through the window of the vehicle and observed a "small bottle of water" in the vehicle's console which Steed has "seen [individuals suspected of having narcotics] use . . . to swallow drugs that they contain in their mouths" and a facsimile of Jesus Malverde whom he has seen in drug houses and "[a]ccording to the people that [Steed has] talked to [Malverde is] the patron saint of drug dealing. R. 88:21-22, 29. However, when pressed Steed was unable to distinguish Malverde from other male Catholic icons other than Jesus Christ. R. 88:28. As noted above, these factors were insignificant and were expressly given very little weight by the trial court.

Moreover, in directly dealing with Mr. Alverez the officers did not ask him any questions within the scope of the initial detention that would have helped determine whether his answers raised their suspicion of criminal activity. The officers did not take any action to determine whether Mr. Alverez was the actual individual connected with the vehicle suspected of drug activity. For example, the officers could have asked Mr. Alverez if he in fact owned the vehicle under suspicion. The officers also could have asked for his name or requested identification which would have assisted in determining whether Mr. Alverez was the individual registered as the owner of the vehicle. Requesting identification would have also allowed the officers to determine whether Mr. Alverez actually resided in the complex or allowed them to ask him regarding his purpose in visiting. However, nothing was done to corroborate or confirm the veracity of this report. The state failed to establish the reliability of the information reported and

failed to show that the officers corroborated the report. Hence, the report was insufficient to support a reasonable suspicion that Mr. Alverez was engaged in criminal activity.

2. The Officers Failed To Show the Significance of the Two Short Stay Visits.

The officers' observation of Mr. Alverez's two short stay visits to the complex even when viewed along with the other factors was not indicative of criminal activity. This is especially true in light of the fact that the officers did not take any steps to gather information that would corroborate their hunch regarding Mr. Alverez's presence at the complex. The officers' subjective belief regarding the observation cannot support a reasonable suspicion. See Lopez, 873 P.2d at 1136-37 (an officer's state of mind is irrelevant); Patefield, 927 P.2d at 659.

While taking "a chance" that they might observe drug activity at this complex, the officers noticed a vehicle pull in that was listed on a narcotics intelligence report. R. 88:3, 9. The officers did not have any specific information that drug dealings were actually occurring at this particular complex. R. 88:9. The officers observed Mr. Alverez get out of the vehicle, go somewhere in the complex, and return to the vehicle and leave. R. 88:4. Walling had a hunch that a drug deal had occurred so he came back to the complex the next day to watch for this vehicle. R. 88:4, 10. The next day, the officers saw this same vehicle pull into the complex and Mr. Alverez get out and go somewhere into the complex. R. 88:4, 21. The officers did not observe on either day

where in the complex Mr. Alverez was going, nor did they attempt to ascertain this information. R. 88:13-15, 31-32. The officers did not observe Mr. Alverez engaged in any unlawful activity nor did they talk to anyone in the complex about why Mr. Alverez was there. When the officers intercepted Mr. Alverez on the way to the vehicle, the officers did not ask him any questions that would have been permissible within the scope of their initial detention that might have corroborated their hunch regarding his activity. The officers did not ask Mr. Alverez his name or request his identification which may have assisted in determining whether the reason he was at this complex was because he lived there. Nor did the officers ever attempt to make any inquiry into Mr. Alverez's visits to the complex. "Any connection between [Mr. Alverez] and illegal activity was purely speculation." Sykes, 840 P.2d at 828. Therefore, Mr. Alverez's two short stay visits have little if any weight in the totality of the circumstances analysis of whether reasonable suspicion existed to extend the scope of the initial detention.

In Sykes, an officer was conducting surveillance on a house suspected of drug activity. During the surveillance, "defendant drove up, parked, and entered the house. Approximately three minutes later, defendant returned to her car and drove off." Id. at 826. In addition to defendant's short stay visit, the only other factors articulated for the officer's suspicion were that "(1) the neighbors had complained about individuals entering and leaving the house at all hours; (2) [The officer] previously had purchased cocaine in the general area; (3) there was unspecified information from a confidential

informant; (4) there was an ongoing investigation of the house; and (5) defendant drove up to the house, entered it and left shortly thereafter." Id. at 828.

The officer followed the car, initiated a stop, and conducted a computer check where he discovered several warrants outstanding for the defendant's arrest. The officer questioned defendant about narcotics trafficking at the home but "[d]efendant denied having any knowledge" about drug activity. Id. at 826. Sykes was arrested on the outstanding warrants, and the officer searched her car, discovering cocaine. Id. The trial court denied defendant's motion to suppress the evidence. Id. Reversing the trial court's decision, this Court concluded that none of the factors relied on by the officer "necessarily indicate wrongdoing as opposed to innocent actions by defendant." Id. at 828.

> At the time of the arrest, any connection between defendant and illegal activity was purely speculation. The police did not know the identity of either the owner or occupants of the house, and they did not know defendant. At that point, they had no positive evidence linking the house to illegal activity. . . Defendant's single visit does not link her to any drug dealers. She could have as easily been at the house to visit someone who was not there, and so left quickly.

Id. at 828-29.

Similarly, the officers belief regarding Mr. Alverez's connection to illegal activity was purely speculative. Id. The officers did not know Mr. Alverez's identity or have any "positive evidence" linking him to the vehicle suspected of being involved in drug activity. Neither the complex itself nor a specific unit had been identified as being linked

to illegal drug dealing activities. While the officers observed Mr. Alverez make two short stay visits to the complex, they had no evidence that he didn't reside there or observe anything that would indicate that he was engaged in any type of illegal conduct.

The totality of the circumstances in this case fails to establish a reasonable articulable suspicion that Mr. Alverez was involved in drug activity permitting the officers to exceed the scope of their initial detention. The officers did not observe anything unusual about Mr. Alverez's behavior or speech when questioning him about the vehicle's lack of insurance, they did not observe any contact consistent with a drug buy, or observe anything to suggest that he was engaging in any type of drug activity. The ambiguous observations made by officers previous to detaining him coupled with their failure to corroborate the report fails to provide the reasonable suspicion necessary to allow the officers to question Mr. Alverez concerning drugs. The officers had no more than a "inchoate and unparticularized suspicion or hunch" that Mr. Alverez was dealing drugs, and failed to take any action that might have confirmed or dispelled their hunch. Johnson, 805 P.2d at 764 (quotations and citations omitted). Therefore, the officers' questions regarding drugs exceeded the permissible scope of the initial detention in violation of the Fourth Amendment.

POINT II. EVEN IF THIS COURT DETERMINES REASONABLE SUSPICION EXISTED PERMITTING THE OFFICERS TO EXCEED THE SCOPE OF THE INITIAL DETENTION, THE STATE DID NOT MEET ITS BURDEN TO JUSTIFY THE OFFICERS' WARRANTLESS SEARCH OF MR. ALVEREZ.

Even if this Court determines that reasonable suspicion existed for the officers to question Mr. Alverez about suspected drug activities, the evidence seized by the officers should be excluded because Mr. Alverez's Fourth Amendment rights were violated when the officers forcibly conducted a warrantless search of his person without the necessary showing of exigent circumstances. Unless a governmental agency has secured a valid warrant to conduct a search, searches "are *per se* unreasonable under the Fourth Amendment– subject only to a few specifically established and well-delineated exceptions." State v. Ashe, 745 P.2d 1255, 1258 (Utah 1987) (quoting Katz v. United States, 389 U.S. 347, 357 (1967). The "well-delineated" exception at issue here required the state to establish that "exigent circumstances" existed justifying a forcible bodily search. City of Orem v. Henrie, 868 P.2d 1384, 1388 (Utah Ct. App. 1994); Schmerber v. California, 384 U.S. 757, 768-72, 86 S. Ct. 1826, 1834-36 (1966). In finding exceptions to the warrant requirement, '[t]he State bears [a] particularly heavy burden" of persuasion. State v. Beavers, 859 P.2d 9, 13 (Utah Ct. App. 1993).

> In order to meet this burden in the case of a bodily search, the State must establish three elements: (1) a clear indication that evidence would be found; (2) exigent circumstances that justified the warrantless bodily intrusion; and (3) that the method chosen was a reasonable one, performed in a reasonable manner.

State v. Hodson, 866 P.2d 556, 560 (Utah Ct. App. 1993), reversed on other grounds , 907 P.2d 1155 (Utah 1995) (citing Schmerber , 384 U.S. at 768-72). A review of the three prongs of the Schmerber test shows that the State failed to meet it burden to justify

the warrantless bodily search of Mr. Alverez. Therefore, the trial court erred in denying Mr. Alverez's motion to suppress.

A. There Was No "Clear Indication" That Evidence Would Be Found.

Given that warrantless searches and seizures must be justified by probable cause, and that the expectation of privacy one has in one's body is the highest recognized under the Constitution, the Schmerber prerequisite to a search that there is a "clear indication" that evidence would be found must be established by probable cause. See Hodson, 866 P.2d at 560 ("'Clear indication' requires that there be probable cause to believe that evidence will be found." (citation omitted)). "In dealing with probable cause, . . . as the very name implies, we deal with probabilities." State v. Menke, 787 P.2d 537, 542 (Utah Ct. App. 1990) (quoting Brinegar v. United States, 338 U.S. 160, 175, 69 S. Ct. 1302 (1949)). Probable cause is "more than bare suspicion." Id. The "'determination[] of whether probable cause exists require[s] a common sense assessment of the totality of the circumstances confronting the arresting or searching officer.'" Patefield, 927 P.2d at 660 (citation omitted). In this case, the officers did not even have a reasonable articulable suspicion to believe Mr. Alverez was involved in drug activities, see Point I, let alone probable cause to believe that he was swallowing drugs in his mouth.

Once the officers detained Mr. Alverez, Walling first asked "him if he knew the vehicle that he was driving was uninsured." R. 88:6, 15. Mr. Alverez responded, "How'd you know that?" R. 88:9. Walling then stated to Mr. Alverez that the "vehicle

that he was driving had been suspected of being a vehicle involved in some drug activities." R. 88:6, 16. Mr. Alverez responded that "he knew nothing of that." R. 88:6. Walling then proceeded to ask Mr. Alverez "if he had any drugs on his person." R. 88:6, 16. Mr. Alverez said "No." R. 88:6, 17. Walling "then asked [Mr. Alverez] if he minded opening up his mouth to show [Walling] he didn't have any drugs in his mouth." R. 88:6, 17. Walling did not notice any unsightly or unusual bulges in Mr. Alverez's mouth nor did he notice anything he would consider unusual except that Mr. Alverez became nervous when asked this question. R. 88:16, 18. In fact, Walling thought Mr. Alverez "talked quite well." R. 88:16-17, 19. Instead of being based on any reasonable articulate suspicion, Walling testified it is a standard question he asks of people he perceives to be drug dealers. R. 88:18. Walling then observed what he described as Mr. Alverez "attempting to move some objects . . . in his mouth" and "some swallowing motion." R. 88:7, 30. Although Mr. Alverez's "mouth was closed," Walling believed he "could see things . . . in the pit of Mr. Alverez's lip area" that looked "like his tongue and moving other objects in attempting to swallow at that time." R. 88:7, 19. Steed, however, only noticed that Mr. Alverez "just appeared that he was attempting to swallow" after Walling asked if he could search Mr. Alverez's mouth for drugs. R. 88:30. Walling and Steed immediately grabbed one of Mr. Alverez's arms and put him in a wrist lock, bending him forward telling him "to spit out what he had in his mouth." R. 88:7-8, 30-31. The time that passed between Walling asking to search Mr. Alverez's

mouth for drugs until Mr. Alverez was forcibly grabbed was between five to 10 seconds. R. 88:8, 17.

Under the totality of the circumstances the officers did not have a "clear indication" that drugs would be found in Mr. Alverez's mouth. At the time of the requested search, the officers did not know if they would in fact find anything in Mr. Alverez's mouth. The officers did not observe Mr. Alverez put any thing in his mouth nor did they observe any conduct by Mr. Alverez that would suggest that his attempt to swallow was indicative of swallowing drugs. Compare Hodson, 866 P.2d at 560 ("Defendant's furtive gestures of putting something in his mouth . . ., coupled with the agents' specific knowledge that [an informant] intended to purchase illegal drugs from defendant provided a clear indication that evidence would be found in defendant's mouth."). In fact, Walling asked to search Mr. Alverez's mouth not because he saw something in there or had a hard time understanding Mr. Alverez but because that is a standard question he asks of those he perceives to be drug dealers. When the officers acted with force in an effort to have Mr. Alverez "spit out" whatever was in his mouth, the officers were acting on no more than a "bare suspicion" or hunch that Mr. Alverez had drugs in his mouth. The only information the officers possessed at this time was based on an uncorroborated report that Mr. Alverez was driving a vehicle that was suspected of "possibly" drug dealing in an area more than 20 blocks away. In the vehicle there was a small bottle of water and a facsimile of Jesus Malverde. The vehicle may or

may not be Mr. Alverez's. Finally, Mr. Alverez made two short stay visits to a complex in which he may or may not be living. This information, even when coupled with the ambiguous "swallowing" conduct, did not amount to probable cause justifying a forcible search. Therefore, there can be no justification for the search under exigent circumstances.

Because the state did not meet its burden to show that there was a clear indication that evidence of drugs would be found in Mr. Alverez's mouth, this Court need not address the other two prerequisites outlined in Schmerber. See State v. Palmer, 803 P.2d 1249, 1252 (Utah Ct. App. 1990). However, even if this Court were to determine that probable cause existed, the exigent circumstances argument still fails because the state did not bear its burden of showing that the evidence would likely have been destroyed had the officers not seized it immediately. Discussion of the other two inter-related prongs further demonstrates how the trial court erred in denying Mr. Alverez's motion to suppress.

B. There Were No Exigent Circumstances.

Under the exigent circumstances prong of the Schmerber test, the supreme court has stated "that 'the police must . . . believe that . . . either contraband or evidence of a crime . . . may be lost if not immediately seized.'" Hodson, 866 P.2d at 561 (quoting State v. Larocco, 794 P.2d 460, 470 (Utah 1990)). The Schmerber requirement of exigent circumstances is a serious one, which is based on the constitutional right to

bodily integrity.

> Search warrants are ordinarily required for searches of dwellings, and, absent an emergency, no less could be required where intrusions into the human body are concerned. The requirement that a warrant be obtained is a requirement that the inferences to support the search "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime." The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.

Schmerber, 384 U.S. at 770 (citations omitted).

The state argued in its opposition to the motion to suppress that exigent circumstances existed because "[a] reasonable officer would know that it is a common practice among drug dealers to swallow the evidence if the police arrive on the scene. Though the officers did not know exactly what was in [Mr. Alverez's] mouth, their suspicion that it may have been an unlawful item was reasonable under the circumstances." R. 39. Continuing, the state argued that the officers' suspicion was reasonable because Mr. Alverez "was traveling in a known drug dealer car and he refused to open his mouth despite repeated requests to do so." R. 39. In denying Mr. Alverez's motion to suppress, the trial court erroneously concluded that "if for no other reason" "at the time that Mr. Alverez was asked if he would open his mouth, he doesn't open his mouth and starts to, in the officer's eyes, destroy evidence" "at that point, . . . [the officers] had [a] reasonable basis to believe a crime was being committed in their presence. R. 38.

Both the state's argument and the trial court's reasoning are flawed. Contrary to the state's assertion, Mr. Alverez was not "traveling in a known drug dealer car" but in a vehicle that was listed on a narcotics intelligence report as one "possibly" dealing drugs. This report was based on no more than an unsubstantiated anonymous tip. See Point I. Next, the refusal to consent to a bodily search cannot create reasonable suspicion and similarly does not give rise to exigent circumstances. See United States v. Manuel, 992 F.2d 272, 274 (10th Cir. 1993) ("The exercise of a right to refuse consent alone cannot be the basis of reasonable suspicion." citing Florida v. Royer, 460 U.S. 491, 498, 75 L. Ed. 2d 229, 103 S. Ct. 1319 (1983)). Finally, the standard of proof for the exigent circumstances prong of the Schmerber test is at least probable cause, not whether the officers had a reasonable suspicion that Mr. Alverez had drugs in his mouth. See Palmer, 803 P.2d at 1252 (stating "'the police must have probable cause and believe that either contraband or evidence of a crime . . . may be lost if not immediately seized.'" (citation omitted)). Reasonable suspicion will only permit limited searches of individuals who are believed to be armed and dangerous which was not put at issue here. See State v. Despain, 2003 UT App 266, ¶8, 74 P.3d 1176 (during an investigative stop officers need only "reasonably believe[] that the individual may be armed and dangerous" to conduct "a 'frisk' or 'pat-down' search of the individual). Therefore, the trial court erroneously applied the reasonable suspicion standard in concluding the officers had a reasonable basis to forcibly search Mr. Alverez's mouth.

The state further argued that exigent circumstances existed because evidence would have been lost or destroyed. R. 39. In order to "establish exigent circumstances justifying a warrantless search" the state must show "'either that the procurement of a warrant would have jeopardized the safety of the police officers or the public, or that the evidence was likely to have been lost or destroyed." Hodson, 866 P.2d at 561 (quoting Palmer, 803 P.2d at 1252). The state contends that because the officers "did not know how the drugs were packaged, exigent circumstances justified a warrantless search." R. 39. However, the evidence the state presented at the motion to suppress hearing belies its argument. R. 88:2-3, 21.

At the motion to suppress hearing, the state presented evidence from the officers regarding their training and experience on how drugs are packaged when they are carried in the mouth. R. 88:2-3, 21. The state presented the following testimony from the officers:

> State: Are you familiar with how drug - how drugs such as cocaine and heroin are usually packaged?
>
> Walling: Yes, I am.
>
> State: And how is that?
>
> Walling: Many times they're packaged in a - they'll take like a plastic, piece of plastic, put the drugs inside that, twist that into a small - small ball, you know, probably the size of the end of my fingertip, and then they encompass that with a balloon and tie that off.
>
> . . . .

State: And where are they usually carried that you've seen?

Walling: Typically when they package them in this fashion they'll carry them in their mouth.

. . . .

State: Have you done drug arrests before?

Steed: Yes.

State: How many would you say?

Steed: I'd say I've personally been involved in more than 20 arrests at least.

State: Have you ever seen people have balloons of cocaine and heroin in their mouths?

Steed: Yes.

R. 88:2-3, 21.

Steed also testified that in regard to the bottle of water in the vehicle that "[i]n the past when [he] had been involved in an initiation of, say traffic stops that contain person that [he] believed to have narcotics [he has] seen them use that water to swallow drugs that they contain in their mouths." R. 88:29. When Steed observed Mr. Alverez "attempting to swallow" "it was [his] belief that he probably had balloons in his mouth." R. 88:30. The state did not present any evidence that drugs are carried using a different method. In fact, the state's evidence demonstrates that the officers believed that if Mr. Alverez was carrying drugs in his mouth the drugs would be packaged in this manner.

In Hodson, 866 P.2d at 561, the defendant argued that exigent circumstances did

not exist because "the police had no knowledge concerning how the heroin was wrapped or whether it would travel safely through his system." Id. This Court determined that it is precisely this reason in which exigent circumstances justify a warrantless search and seizure. Id. However, in reversing this Court's decision regarding the reasonableness of the search, the supreme court noted that "drugs ingested [by swallowing] can only follow two paths: Either they will pass through the system intact because of their packaging, or they will be absorbed into the bloodstream of the swallower. In either event, they are susceptible to identification and recovery in supervised, nonviolent post-arrest setting." Hodson, 907 P.2d at 1158.

Similarly, in Palmer, this Court cited People v. Bracamonte, 540 P.2d 624, 631 (Cal. 1975), for the proposition that there was "no justifiable reason to believe [that the evidence] would be destroyed by defendant if he had swallowed it." Palmer, 803 P.2d at 1253. In Bracamonte, narcotics agents had secured a warrant to search defendant's residence, vehicles and person. 540 P.2d at 626. While attempting to execute the warrant, the defendant attempted to flee in her vehicle. Id. An agent then observed the defendant place two balloons in her mouth and swallow them. Id. The agent watched as the defendant made "two more quick hand movements, each time apparently placing more objects into her mouth." Id. After apprehending the defendant, the agents, twenty minutes later, took her to a local hospital to retrieve the objects the defendant had swallowed. Id. After attempting to insert a rubber tube down the defendant's nose and

esophagus, the defendant agreed to drink the emetic solution allowing the officers to retrieve seven balloons of heroin. Id. at 626-27.

The court determined that although "there clearly was probable cause to believe that the defendant had swallowed packages containing heroin, there was no [exigency] justifying the intrusion into her body." Id. at 628. So although there was a "'clear indication' that the defendant probably swallowed balloons of heroin, . . . there was no substantial reason to believe that evidence would be destroyed." Id. at 630-31; Hodson, 907 P.2d at 1158. The testimony presented demonstrated that "[t]he rubber container would effectively prevent the contents from being absorbed into the system." Id. at 631 (quotations and citations omitted). Because there is a "high statistical probability that the balloons would 'pass through,'" the defendant "easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance." Id.

In this case, the state presented evidence regarding the officers' belief on how the drugs would be packaged. The officers' testimony can only support a conclusion that they believed that if Mr. Alverez was carrying drugs in his mouth, they would be packaged in accordance with their prior knowledge and experience. In addition, the state presented "no justifiable reason to conduct [a] warrant less search since [the] evidence could be retrieved through 'the ordinary processes of nature.'" Palmer, 803 P.2d at 1253 (citing Bracamonte, 540 P.2d at 631); see also Hodson, 907 P.2d at 1158; compare Schmerber, 384 U.S. at 770-71 (exigent circumstances exist where percentage of alcohol

in blood rapidly dissipates after drinking stops). The state failed to present any evidence regarding the officers' belief that if the drugs were swallowed they would be lost or destroyed. In fact, the state failed to introduce any evidence about the likelihood that the drugs would have been damaged by going through the human digestive tract or that Mr. Alverez's health would have been jeopardized. Hodson, 907 P.2d at 1158 (regardless of how drugs swallowed are packaged "they are susceptible to identification and recovery in supervised, nonviolent post-arrest setting").

Therefore, the "exigent circumstances" prong of Schmerber is not satisfied. The failure of the state to demonstrate the exigent circumstances prong by at least probable cause obviates the need for the Court to address the third prong of Schmerber. Palmer, 803 P.2d at 1252. Consideration of that prong demonstrates further why suppression is appropriate.

C. The Officers' Method Was Not Reasonable.

Under the third prong of the Schmerber test, the state must show that the method chosen was reasonable and the search was done in a reasonable manner. Schmerber, 384 U.S. at 771-72. In Winston v. Lee, 470 U.S. 753, 761-62, 105 S. Ct. 1611 (1985), the Supreme Court reiterated the need for probable cause showing that evidence will be found and that exigent circumstances are sufficient to dispense with the warrant requirement. Id. at 761. In reviewing Schmerber and the reasonableness prong, the Supreme Court articulated a three-part test. The first factor is "the extent to which the

procedure may threaten the safety or health of the individual." Winston, 470 U.S. at 761; Hodson, 907 P.2d 1155, 1157 (Utah 1995). While the Court found that a physician's blood draw was permissible because "'[f]or most people, [a blood test] involves virtually no risk, trauma, or pain'" Winston, 470 U.S. at 761 (quoting Schmerber, 384 U.S. at 771), the Winston Court found that the risks involved in the surgical removal of a bullet from the defendant were too great to be reasonable. Id. at 764.

In this case, the officers did not have probable cause to believe that evidence would be found and no exigent circumstances, and yet they chose an unreasonable method of investigation that involved both pain and risks to Mr. Alverez's health. The officers in this case each grabbed Mr. Alverez by one of his arms and put him in a very painful wrist lock forcing him to bend forward while ordering him to spit out the contents of his mouth. R. 88:7-8, 30-31. This method was not only extremely painful but particularly dangerous in light of the officers' belief that Mr. Alverez was attempting to swallow balloons of drugs in his mouth. Grabbing Mr. Alverez in such a manner created a substantial risk of him aspirating on objects in his mouth. Given the state's evidence of the officers' experience with how drugs carried in the mouth are packaged, and the "high statistical probability that balloons would 'pass through'" the defendant, the officers "easily could have been transported to jail and placed in an isolation cell and kept under proper surveillance." Bracamonte, 540 P.2d at 631; Hodson, 907 P.2d at 1157.

The second factor in the reasonableness analysis is "the extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity." Winston, 470 U.S. at 761-62; Hodson, 907 P.2d at 1157. The Court noted that searches of people's homes and phone conversations, and forcing people to come to the police station were neither painful nor physically dangerous, but did impinge on Fourth Amendment interests, the "individual's sense of personal privacy and security." Winston, 470 U.S. at 762. As stated above, the officers grabbed Mr. Alverez's arms and put him in a painful wrist lock, bending him forward in an attempt to prevent him from swallowing. Having his body subjected to such physical pain in a public place epitomizes conduct that intrudes on one's rights to privacy, bodily integrity and dignitary interests. Therefore, the officers conduct was constitutionally unreasonable.

The final factor in the reasonableness analysis is "the need to preserve evidence of criminal behavior." Hodson, 907 P.2d at 1158. Similar to the argument made by the state in Hodson, the state argues here that "[t]he justification for the force used in this case is the need to preserve evidence and protect defendant from harm." Id. The supreme court rejected the state's argument stating:

> There is considerable indication . . . that drug dealers commonly seek to secrete drugs by means of swallowing, and it does not seem likely that they would routinely risk their own safety or lives. [People v. Jones, 257 Cal. Rptr. 500, 503 (1989); State v. Tapp, 353 So.2d 265, 269 (La. 1977)]. . . . No emergency or exigency justifies the use of force . . . to preserve evidence which would be readily (if inconveniently) accessible through nonviolent means.

Id.

The supreme court's determination in Hodson applies equally in this case. The state presented no evidence that "might have supported a reasonable fear by the officers that swallowing the [balloon wrapped drugs] would render their contents nondiscoverable or harmful to defendant." Id. The state demonstrated no compelling need for this search, because they had little more than a hunch that evidence would be found at the time of the search, and there were available constitutional methods of conducting the search that were ignored. Because the state did not meet its burden to justify the warrantless and unreasonable search of Mr. Alverez, all evidence seized as a result should be suppressed. Wong Sun v. United States, 371 U.S. 471 (1963).

CONCLUSION

The Appellant, Mr. Alverez, respectfully requests this Court to reverse the trial court's denial of his motion to suppress, and reverse his conviction.

SUBMITTED this 9th day of ~~April~~ June, 2004.

DEBRA M. NELSON
Attorney for Defendant/Appellant

STEVEN G. SHAPIRO
Attorney for Defendant/Appellant

CERTIFICATE OF DELIVERY

I, DEBRA M. NELSON, hereby certify that I have caused to be hand-delivered the original and seven copies of the foregoing to the Utah Court of Appeals, 450 South State, 5th Floor, P.O. Box 140230, Salt Lake City, Utah 84114-0230, and four copies to the Utah Attorney General's Office, Heber M. Wells Building, 160 East 300 South, 6 th Floor, P.O. Box 140854, Salt Lake City, Utah 84114-0854, this 9th day of ~~April~~ June, 2004.

DEBRA M. NELSON

DELIVERED to the Utah Court of Appeals and the Utah Attorney General's Office as indicated above this _____day of April, 2004.

ADDENDA

ADDENDUM A

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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ERNESTO ALVAREZ, Defendant.	FINDING OF FACT AND CONCLUSIONS OF LAW Case No. 031904214 Judge Paul G. Maughn

THE ABOVE ENTITLED MATTER CAME BEFORE the Court for hearing and determination of the Defendant's Motion to Suppress, on August 26, 2003. The Honorable Paul G. Maughn presided. The Defendant was present and represented by Steve Shapiro. Kimberly McKinnon, Deputy District Attorney for Salt Lake County, represented the State. Based upon the memorandums of law submitted and the arguments of counsel presented, and for good cause shown, the Court now makes and enters the following:

FINDINGS OF FACT

1. On June 24, 2003, Sergeant Chad Steed and Officer Wahlin of the Salt Lake City Police Department observed a vehicle under suspicion for illegal activities pulling into a apartment complex at 2430 S. Elizabeth Street. The officers watched the defendant enter the complex, and then return shortly after.

pm
for the second consecutive day and at a near the same time of day.

2. On the initial approach to the defendant's vehicle, Sergeant Steed observed in the center console of the defendant's vehicle a bottle of water as well as a facsimile of "Jesus Malverde."

3. When the defendant returned to his vehicle Officer Wahlin talked to the defendant. During the course of the conversation, Officer Wahlin asked the defendant if he had drugs in his mouth. At that point the defendant made swallowing motions with his mouth. Both officers simultaneously watched as the defendant moved objects in his mouth and tried to swallow. Officers then each physically grabbed one of the defendant's arms and forced him to spit out the balloons containing illegal narcotics.

FROM THE FOREGOING FINDINGS OF FACT, THE COURT NOW MAKES AND ENTERS THE FOLLOWING:

CONCLUSIONS OF LAW

1. In the totality of the circumstances, the Officers acted reasonably.
2. The defendant did not open his mouth and officers clearly observed a crime being committed in their immediate presence.
3. Given the circumstances, a search warrant was not needed.
4. The Defendant's Motion to Suppress Illegally Obtained Evidence is Denied.

DATED this 9 day of Oct, 2003.

BY THE COURT:

District Court Judge

Approved as to Form:

Kimberly McKinnon

DAVID E. YOCOM
District Attorney for Salt Lake County
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IN THE THIRD DISTRICT COURT, SALT LAKE DEPARTMENT

IN AND FOR THE COUNTY OF SALT LAKE, STATE OF UTAH

THE STATE OF UTAH, Plaintiff, -vs- ERNESTO ALVAREZ, Defendant.	ORDER Case No. 031904214 Judge Paul G. Maughan

Based upon the Findings of Fact and Conclusions of Law, it is hereby ORDERED, ADJUDGED AND DECREED:

The Defendant's Motion to Suppress Illegally Obtained Evidence is Denied.

DATED this 9 day of Oct, 2003.

BY THE COURT:

District Court Judge

ADDENDUM B

AMENDMENT IV

[Unreasonable searches and seizures.]

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

77-7-15. Authority of peace officer to stop and question suspect — Grounds.

A peace officer may stop any person in a public place when he has a reasonable suspicion to believe he has committed or is in the act of committing or is attempting to commit a public offense and may demand his name, address and an explanation of his actions.

History: C. 1953, 77-7-15, enacted by L. 1980, ch. 15, § 2.